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VIA HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Access Charge Reform, Reform of Access Charges
Imposed by Competitive Local Exchange Carriers; CC Docket No. 96-262

Dear Ms. Salas:

Enclosed please find an original and four copies of the Reply Comments of U.S. TelePacific Corp. d/b/a TelePacific Communications for filing in the above-captioned proceeding. If you have any questions, please call me at (202) 637-2168.

Very truly yours,

David E. Easler

David E. Easler

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International Transcription Service, Inc.
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Re: Reply Comments of U.S. TelePacific CC Docket No. 96-262

Dear Sir or Madam:

Enclosed please find a read only diskette formatted in a Windows compatible format for Microsoft Word which contains a read only electronic file of the Reply Comments of U.S. TelePacific Corporation in FCC CC Docket No. 96-262. Please contact me at 202 637-2168 should you have any questions.

Very truly yours,

David E. Easler

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Before the
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Washington, D.C. 20554

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In the Matter of

Access Charge Reform
Access Charges Imposed
By Competitive Local
Exchange Carriers

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CC Docket No. 96-262

ORIGINAL

REPLY COMMENTS OF U.S. TELEPACIFIC CORP.

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TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY.....	1
II.	TARGETING OF LARGE CUSTOMERS WITH SIGNIFICANT TRAFFIC IS A LEGITIMATE BUSINESS MODEL.....	3
A.	Commission Agreements Have Allowed CLECs To Establish A Customer Base.....	3
B.	AT&T And Sprint Have Attempted To Prejudice The Commission Against 8YY Commission Agreements With Inflammatory Language and Innuendo.....	4
C.	The IXCs Seek To Regain Customers Won By CLECs	5
III.	THE AT&T AND SPRINT CHARACTERIZATIONS OF CLEC 8YY ACCESS TRAFFIC ARE MISLEADING AND OUT OF DATE	6
A.	TelePacific Provides A Variety Of Business Customers With All Types Of Originating and Terminating Traffic	6
B.	Past Access Rates For 8YY Access Services Are Not Relevant To The Current Proceedings.....	8
IV.	WITHOUT FACTUAL SUPPORT THE IXC COMMENTERS ASSERT THAT CLEC 8YY TRAFFIC RELATIONSHIPS ARE CONDUCIVE TO FRAUD.....	9
V.	THE ACCESS ORDER HAS ADEQUATELY ADDRESSED 8YY ACCESS TRAFFIC RATES.....	11
VI.	CONCLUSION	14

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Access Charge Reform)	CC Docket No. 96-262
Access Charges Imposed)	
By Competitive Local)	
Exchange Carriers)	

REPLY COMMENTS OF U.S. TELEPACIFIC CORP.

U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”), by its attorneys, hereby submits these reply comments filed in response to the Commission’s Seventh Report and Order and Further Notice of Proposed Rulemaking (the “*Seventh Report and Order*” or the “*Order*”) issued in the above captioned proceeding¹ and the comments filed in the proceeding. For the reasons stated below, TelePacific urges the Commission to disregard the speculative statements of AT&T Corp. (“AT&T”), Sprint Communications (“Sprint”) and WorldCom, Inc. (“WorldCom”) (collectively, the “IXC commenters”) and maintain the same benchmark rate and transition period for 8YY access traffic as the Commission has established for other forms of access traffic.

I. INTRODUCTION AND SUMMARY

The Commission has requested comments on “AT&T’s proposal immediately to benchmark CLEC 8YY access services to ILEC rates” and on whether “the presence of certain incentives to generate artificially high levels of 8YY traffic necessarily justifies reducing the

¹ *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146 (rel. Apr. 27, 2001).

tariffed rate for all such traffic immediately to the ILEC rate.”² At no point in the *Seventh Report and Order* did the Commission suggest that 8YY commission arrangements offered by competitive local exchange carriers (“CLECs”) violated the Commission’s regulations. AT&T and Sprint, however, have taken this opportunity to use inflammatory language, speculation, selected use of facts and/or factual inaccuracies in an attempt to prejudice the Commission against such legitimate business practices. Using this technique, the IXC Commenters have sought to justify a decrease in the benchmark access rate for 8YY traffic below that contemplated in the Access Charge Reform proceedings.

Targeting customers with high traffic volumes, through 8YY commission agreements or otherwise, has been a legitimate and necessary strategy for many CLECs entering new markets. Customers such as universities, hospitals and hotels are intense users of all types of communications services and therefore valuable customers. Contrary to the speculation of the IXC Commenters, such businesses do not inflate their 8YY traffic volume and are not in a position to do so.

There is nothing in the nature of 8YY traffic or commission agreements that justifies a rate structure different from other forms of access traffic. In reforming access charges, the Commission has ordered that 8YY access rates, along with all other terminating and originating access rates, be reduced to 2.5 cents per minute immediately and transitioned to ILEC rates in 3 years. The Commission arrived at this regime based on significant input from the industry and the benchmark rate reflects the balancing of lowering rates and a recognition of a need to protect CLECs from drastic price changes. Despite the shrill cries of AT&T, Sprint and MCI, there is no reason to immediately reduce 8YY access traffic rates to ILEC rates.

² *Seventh Report and Order* at ¶¶ 98 and 104.

II. TARGETING OF LARGE CUSTOMERS WITH SIGNIFICANT TRAFFIC IS A LEGITIMATE BUSINESS MODEL

A. Commission Agreements Have Allowed CLECs To Establish A Customer Base

Large aggregators of traffic are highly valuable customers to any telecommunications provider but especially to start-up carriers attempting to establish an initial client base. As other CLECs have noted, “[l]arge generators of traffic, such as hospitals, universities, and office campuses, are desirable customers because they generate a significant amount of traffic in addition to 8YY traffic.”³ CLECs, including TelePacific, have used commission incentives to attract such customers with the desire that those customers subscribe to a broad range of communications services.⁴

Like other discounts provided by carriers to customers, such incentive programs are common and necessary to convince such large customers to take the time and trouble to change carriers.⁵ This is especially true when competing against incumbent carriers. As the Commission has recognized “[a]n incumbent can forestall the entry of potential competitors by ‘locking up’ large customers by offering volume and term discounts at or below cost.”⁶

By providing these customers with excellent toll-free access service, TelePacific has been able to convince many of those customers to also subscribe to its local, long-distance

³ Focal Communications Corporation Comments (“*Focal Comments*”) at 5 (June 20, 2001).

⁴ *See Id.* at 6.

⁵ *Id.* (“These incentive payments are particularly important for new market entrants since they must induce customers to switch from the incumbent provider”).

⁶ *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition for U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, CCB/CPD File No. 98-63, and CC

and broadband services. TelePacific estimates that over a third of its customers that were initially 8YY access customers now use other TelePacific services as well. Targeting of businesses with high traffic volumes, whether aggregators of traffic or not, has helped TelePacific to establish itself in the California and Nevada markets by creating a respected name and presence.

B. AT&T And Sprint Have Attempted To Prejudice The Commission Against 8YY Commission Agreements With Inflammatory Language and Innuendo

AT&T and Sprint have attempted to create an atmosphere of impropriety by using shrill and highly charged language. AT&T repeated uses terms such as “CLEC 8YY scam”, “revenue-sharing schemes”, “scheme,” “kickback”, “CLEC perpetrators of the 8YY scam” and “rip-off of IXC’s” in discussing 8YY access traffic commission agreements.⁷ Sprint uses a similar tactic referring to such agreements as “kickback schemes,” “schemes,” and “unlawful.”⁸

AT&T and Sprint ignore the fact that the Commission has recognized the legitimacy of similar commission structures in the past. As discussed in TelePacific’s and other carriers’ comments, the Commission has sanctioned commissions paid by IXC’s in the context of payphone owners who agree to presubscribe their payphones to an IXC and fee agreements between operator services providers and traffic aggregators such as hotels.⁹

Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rule Making, FCC 99-206, at ¶ 79 (August 27, 1999).

⁷ See AT&T Corp. Comments at Table of Contents, 2-11, 13-15 (June 20, 2001) (AT&T finds an opportunity to use at least one of these terms on every page of its comments except for pages 1 and 12).

⁸ See Sprint Corporation Comments at 4-9 (June 20, 2001) (“Sprint Comments”).

⁹ See *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128, Notice of Proposed Rule Making, FCC 96-254, ¶ 9 (1996); see also Focal Comments at 6-7; Comments of Time Warner Telecom at 3-4 (June 20, 2001); Comments of the

Indeed, as Sprint points out, AT&T's subsidiary ACC National currently pays the type of commissions about which AT&T complains in its comments.¹⁰ In fact, incentive and commission offerings have been part of AT&T's corporate strategy for years.

Aggregators exist because AT&T decided it wanted to win back long distance business it had lost. AT&T sliced its rates, liberalized its bulk billing rules, and encouraged those consultants who had recommended their clients switch to MCI and Sprint to become aggregators. These consultant-turned-aggregators simply solicit anyone's long distance business and add it to their collection. AT&T sends their end-user a bill and the consultant-turned-aggregator a commission check.¹¹

Further, since at least 1993, AT&T has offered commissions to hotels based on the volume of 0+ traffic the hotel sends to AT&T¹² and has entered into similar arrangements with payphone operators.¹³

Despite AT&T's history of offering similar commissions and the Commission's recognition that such arrangements are permissible, AT&T uses inflammatory language in its comments in this proceeding to give the impression that commissions paid by CLECs are improper. This hypocritical ploy lacks merit and any substance.

C. The IXCs Seek To Regain Customers Won By CLECs

AT&T and Sprint argue that there is a "bottleneck" that CLECs "exploit" in the provision of 8YY access traffic to large customers.¹⁴ AT&T admits, however, that IXCs and

Association of Communications Enterprises at 4 (June 20, 2001) ("ASCENT Comments").

¹⁰ See Sprint Comments at 6-7 ("ACC . . . charges higher switched access rates than the ILEC and pays kick-backs to such end users based on the amount of switched access charges collected by ACC on traffic to and from its end users' locations.")

¹¹ Focal Comments at 5 (quoting Newton's Telecom Dictionary (16th Ed. 2000)).

¹² See *Telesphere Int'l, Inc. v. AT&T*, 8 FCC Rcd 4945 (1993).

¹³ See *AT&T Private Payphone Commission Plan*, 7 FCC Rcd 7135 (1992) (in which the Commission held that the payment of commissions by AT&T to private payphone companies for volume "0+" traffic was not an unlawful rebate).

¹⁴ See AT&T Comments at 3-4; Sprint Comments at 2.

ILECs also seek to provide dedicated access facilities to these same “large volume generators of 8YY” traffic.¹⁵ The dedicated special access facilities offered to customers such as hotels provide a “source of revenue to the ILEC or IXC.”¹⁶ Put in context, the IXC Commenters’ complaints appear to be that now that CLECs have entered into the competitive mix, the IXCs have lost customers. The IXCs are still free to provide their dedicated service facilities to customers, along with any incentives they choose to offer. Instead, AT&T and Sprint have chosen to use these proceedings to attack a legitimate business strategy of the CLEC using inflammatory language and little else. They should not be allowed to influence this Access Charge Reform proceeding based on innuendo.¹⁷

III. THE AT&T AND SPRINT CHARACTERIZATIONS OF CLEC 8YY ACCESS TRAFFIC ARE MISLEADING AND OUT OF DATE

The data and examples used by AT&T and Sprint regarding 8YY access traffic sent by CLECs are both misleading and outdated. In particular, AT&T mischaracterizes TelePacific’s business and the services it provides using partial facts and stale data. Having created a strawman that is not based on reality, AT&T extrapolates to the entire CLEC industry using this faulty premise.

A. TelePacific Provides A Variety Of Business Customers With All Types Of Originating and Terminating Traffic

In its comments, AT&T implies that TelePacific serves primarily large hotels whose guests make 8YY calls and that 99.97 percent of TelePacific’s originating traffic is 8YY

¹⁵ AT&T Comments at 6-7.

¹⁶ AT&T Comments at 7.

¹⁷ See ASCENT Comments at 5 (“[I]n the absence of abusive conduct, the Commission should decline AT&T’s ill-advised invitation to attempt to influence through manipulation of the access charge regime the business plans and service offerings of competitive LECs, leaving such determinations instead to the marketplace.”)

traffic.¹⁸ Neither of these allegations is in fact accurate. TelePacific is a facilities-based carrier that provides a variety of telecommunications services to a broad range of business clients. These clients include universities, corporations, hospitals, convention centers, small businesses, and hotels. While there is nothing wrong with serving hotels, as AT&T asserts, it is not TelePacific's primary focus. To its business customers, TelePacific offers local exchange services, long distance service and broadband access.

TelePacific's "originating" traffic¹⁹ consists of calls originated by its own customers and traffic originated from customers presubscribed to IXC's as well as 8YY traffic. As discussed above, TelePacific tries convince its customers, including hotels, that they should use TelePacific for all their services. If the customer agrees, then the only traffic from that business that an IXC is likely to see would be 8YY calls.

AT&T's statement that "over 99.7 percent of TelePacific's originating traffic is 8YY traffic" is inaccurate.²⁰ As AT&T is aware, this number represents only the percent of originating traffic sent to AT&T in one particular month, May 2000. The number did not take into account originating traffic TelePacific provided to other IXC's *or* intraLATA toll tariff *or* long distance traffic TelePacific provided directly to its own customers during that month.

Moreover, the statistic AT&T cited is dated. TelePacific started providing service only seven months before that invoice was sent to AT&T. As discussed above, part of TelePacific's business entry strategy was to court large businesses with incentives such as the 8YY commission and then promote the use of its other services. As TelePacific has matured, it

¹⁸ AT&T Comments at 4. Sprint also uses the 99.7 percent statistic in its comments. *See* Sprint Comments at 6 n.6.

¹⁹ Although 8YY traffic is considered terminating traffic, for purposes of these comments we will refer to 8YY traffic as "originating" traffic.

²⁰ AT&T Comments at 4, 13-14.

has continued to serve customers with high 8YY traffic volumes but those same customers have also started using TelePacific's local and long distance services as well. TelePacific's non-8YY originating traffic is a significant and growing portion of its total originating traffic.

B. Past Access Rates For 8YY Access Services Are Not Relevant To The Current Proceedings

Many of AT&T and Sprint comments gloss over the fact that the Commission has already addressed access rates for 8YY traffic by setting a benchmark rate of \$.025, which will transition to the ILEC rate over three years. AT&T cites the past rates of TelePacific and Business Telecom, Inc. ("BTI") as examples of CLECs with high 8YY access rates.²¹ Whatever the rates of CLECs in the past, current rates are subject to the new benchmark. Thus, past rates are not relevant to the current proceeding.²²

While AT&T argues that "there is no reason to believe that the reduction of the rates of these CLECs to 2.5 cents per minute will render this scheme unprofitable or stem its growth,"²³ Commission findings do not support this assertion. While TelePacific believes that the *BTI* order was incorrectly decided,²⁴ it is relevant to note that the Commission found that a lawful rate for all forms of BTI's access traffic including 8YY traffic was between 3.8 cents and 2.7 cents.²⁵ This provides guidance that the benchmark of 2.5 cents for all access traffic,

²¹ AT&T Comments at 5.

²² In response to the Commission's Seventh Report and Order, TelePacific lowered its tariffed switched access rates to 2.5 cents. TelePacific notes that this was the second reduction of its rates in seven months.

²³ AT&T Comments at 6. The recent establishment of the benchmark rate has resulted in the lowering of access rates, including 8YY access rates, for many CLECs and increased the rate of return for IXCs accordingly.

²⁴ See Letter from TelePacific to the Federal Communications Commission, File Nos. EB-01-MD-001 and EB-01-MD-002 (July 19, 2001).

²⁵ *BTI Order* at ¶¶ 53-59.

including 8YY traffic, is neither excessive nor will result in the excessive profits claimed by AT&T.

AT&T's and Sprint's use of data that are incomplete and dated create an inaccurate portrait of TelePacific's business in particular and the CLEC industry in general.²⁶ TelePacific urges the Commission not to change the benchmark rate set forth in its *Seventh Report and Order* based on these so called "facts" asserted by AT&T and Sprint.

IV. WITHOUT FACTUAL SUPPORT THE IXC COMMENTERS ASSERT THAT CLEC 8YY TRAFFIC RELATIONSHIPS ARE CONDUCTIVE TO FRAUD

AT&T and MCI argue in their comments that commissions in 8YY traffic agreements are conducive to fraud. AT&T goes so far as to state that such customers have a "financial incentive to engage in inappropriate and wasteful behavior by artificially generating a larger volume of 8YY calls."²⁷ AT&T cites a single instance of fraud, which was addressed, and vaguely describes complaints from 8YY customers "about this problem" regarding "nuisance calls" as support for the proposition that 8YY commission agreements generate unnecessary traffic.²⁸ AT&T, however, does not describe how the 8YY customers who received the "nuisance calls" or AT&T ever determined that the calls were part of some scheme to increase access traffic. Without support this proposition seems highly speculative.

AT&T is using these isolated events as a hobgoblin to scare the Commission into believing all 8YY traffic aggregators will act fraudulently. As other commenters have noted

²⁶ TelePacific notes that, although AT&T served copies of its comments on thirty-six individuals, it did not bother to serve a copy upon TelePacific. If TelePacific had not been monitoring the proceedings, AT&T's statements would have been left uncontested and unclarified.

²⁷ AT&T Comments at 8.

²⁸ AT&T Comments at 9.

“[w]hile AT&T’s allegations are dramatic, there is no indication that any such instances amount to anything more than aberrations.”²⁹

Most 8YY traffic will continue at the same levels regardless of the existence of commissions. For customers such as universities, large businesses and hotels, the 8YY traffic is controlled by end-users not associated with them. For example, as the Association for Telecommunications Professionals in Higher Education (“ACUTA”) states “the factors which lead to the generation of toll free calling traffic on a college campus . . . are completely unrelated to contractual revenue-sharing arrangements with CLECs or other carriers.”³⁰ In its comments, ACUTA notes “students choose to use toll free ‘dial around’ in order to use alternative service providers, regardless of any revenue gained by the university. The volume of 8YY calling on university campuses would not be influenced in any way whatsoever by any contractual arrangement with a CLEC to carry 800 traffic.”³¹ Similarly, in hotels it is the guests that are the primary source of 8YY calls through the use of calling cards.³² It seem ludicrous to imagine that a university or large hotel chain would engage in fraudulent behavior by having their employees make random “nuisance” 800 calls in order to increase their commissions. While a small

²⁹ Comments of Minnesota CLEC Consortium at 2 (June 20, 2001).

³⁰ ACUTA Comments at i (June 20, 2001).

³¹ *Id.* at 2.

³² IXCs have successfully marketed calling cards and people will continue to use them at universities, hospitals, hotels and similar locations. *See, e.g.*, AT&T OneRate Calling Card Plan, (promising customers a rate of 25 cents per minute plus a monthly fee “so unfamiliar long distance or pay phone companies won’t overcharge you” when you are away from home.)
http://www/index.jhtml?type=offer&offer=One_Rate_Card_Plan&service=cc&portal=shopat

number of individuals may act inappropriately, the best way to deal with such events is through carrier cooperation and/or legal action.³³

TelePacific (and almost certainly other CLECs) monitors its network for potential fraud. When TelePacific suspects fraud or a third-party notifies TelePacific of suspected fraud, such cases are immediately investigated. TelePacific has detailed procedures established for investigating and dealing with potential fraud situations, including notifying carriers, if appropriate. TelePacific has worked with multiple IXC's in the past to resolve potential fraud issues and will continue to do so in the future. Through good communication and inter-carrier cooperation any potential cases of fraud such as the ones suggested by AT&T and MCI can be quickly and efficiently addressed. In the rare instance that a carrier is involved in a fraud or unable resolve a dispute, the best course of action is to seek resolution from the appropriate authorities. No commenters have presented evidence that such problems are frequent.

V. THE ACCESS ORDER HAS ADEQUATELY ADDRESSED 8YY ACCESS TRAFFIC RATES

As TelePacific explained in its comments, the *Seventh Report and Order* appropriately addresses the concerns of the IXC's regarding switched access services, including 8YY access services, by setting a benchmark of 2.5 cents that will transition to ILEC rates over three years. The policy goals that the Commission achieved by establishing the tariff benchmarks for competitive local exchange carrier access apply equally to all forms of switched

³³ U.S. law provides for significant penalties against individuals engaged in activities about which the IXC Commenters complain. "It shall be unlawful for any person within the United States . . . to make any call . . . using any automatic telephone dialing system . . . [to] any service for which the called party is charged for the call." 47 U.S.C. § 227(b)(1). Harmed individuals may bring suit against persons to enjoin such behavior and seek damages of \$500 for each violation with potential triple damages for willfully violations. 47 U.S.C. § 227(b)(3).

access traffic, including 8YY traffic. Eliminating the tariff benchmarks for CLEC-originated 8YY traffic would be inconsistent with the FCC's findings in its *Seventh Report and Order*.³⁴

As the Commission noted and other commenters acknowledged, "a CLEC provides a closely similar service and uses similar or identical facilities, regardless of whether it provides originating 8YY access service, or terminating or originating access service for conventional 1+ calls."³⁵ The Commission has not segregated 8YY access traffic as deserving special treatment in the past and it should not do so here. For example, the Commission does not require ILECs to charge different rates for 8YY traffic than for 1+ traffic but instead requires that ILECs and CLECs handle originating 8YY traffic as they do terminating access traffic.³⁶

This fundamental concept that 8YY traffic should be treated in the same manner as all other forms access traffic was implicit in CLEC Access Charge Reform proceedings. No attempt was made by any party to the proceedings to demonstrate that rates should vary by the type of call placed by an end user. The CLEC benchmark rates established through these proceedings reflect the understanding that the access traffic in question includes 8YY traffic. Only after the benchmark rates were proposed did AT&T suggest that certain forms of access traffic be treated differently.

³⁴ See *Seventh Report and Order* at ¶¶ 41-45 ("We conclude that the benchmark rate, above which a CLEC may not tariff, should eventually be equivalent to the switched access rate of the incumbent provider operating in the CLEC's service area. We do not, however, immediately set the benchmark rate at the competing ILEC rate because such a flash cut likely would be unduly detrimental to the competitive carriers that have not previously been held to the regulatory standards imposed on ILECs.").

³⁵ *Seventh Report and Order* at ¶ 104; see also Focal Comments at 9; Comments of the Association of Communications Enterprises at 2 (June 20, 2001) ("Originating competitive LEC 8YY toll-free traffic uses the same access facilities in the same way as other forms of originating switched access traffic and hence, should be priced no differently.").

³⁶ See Focal Comments at 9.

The policies behind the transition period for access rates in general apply to 8YY traffic as well. The transition period is intended to avoid “too great a dislocation in the CLEC segment of the industry” and allow CLECs time to obtain “alternative sources of the substantial revenues which the benchmark will deprive them.”³⁷ Immediately benchmarking the tariff rates for access at the ILEC rate for originating 8YY traffic would severely harm the many CLECs, such as TelePacific, that handle a significant amount of toll-free traffic.

³⁷ *Seventh Report and Order* at ¶ 62.

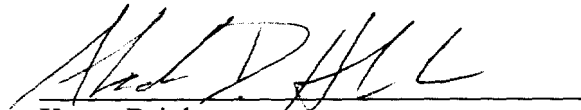
VI. CONCLUSION

TelePacific strongly urges the Commission to continue to apply the same benchmark rate mechanism to CLEC 8YY access traffic as it does to all other CLEC access traffic. AT&T, Sprint and MCI have provided no concrete evidence as to why 8YY traffic should be treated differently. Having spent over a year examining the industry and policies supporting the current benchmark rate, the Commission should not make a fundamental change in the access charge regime as a result of unsupported last minute allegations.

Respectfully submitted,

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July 20, 2001

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I, David E. Easler, hereby certify that a copy of the foregoing Reply Comments of U.S. TelePacific Corporation was delivered upon the following in the manner described, on this 20th day of July in the year 2001:

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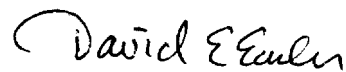
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